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IN THE

Supreme Court of the United States

THE UNIVERSITY OF ALABAMA AT BIRMINGHAM, BOARD OF TRUSTEES, and THE ALABAMA DEPARTMENT OF YOUTH SERVICES,

Petitioners,

—v.—

PATRICIA GARRETT and MILTON ASH,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF LAMBDA LEGAL DEFENSE & EDUCATION FUND, INC., THE AMERICAN CIVIL LIBERTIES UNION, THE ANTI-DEFAMATION LEAGUE, THE CALIFORNIA WOMEN'S LAW CENTER, THE CENTER FOR WOMEN POLICY STUDIES, THE FRIENDS COMMITTEE ON NATIONAL LEGISLATION, GAY AND LESBIAN ADVOCATES AND DEFENDERS, THE HUMAN RIGHTS CAMPAIGN, THE NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM, THE NATIONAL COUNCIL OF JEWISH WOMEN, THE NATIONAL GAY AND LESBIAN TASK FORCE, THE NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES, THE NATIONAL URBAN LEAGUE, THE NATIONAL WOMEN'S LAW CENTER, THE NATIONAL YOUTH ADVOCACY COALITION, THE NORTHWEST WOMEN'S LAW CENTER, NOW LEGAL DEFENSE AND EDUCATION FUND, PEOPLE FOR THE AMERICAN WAY FOUNDATION, WOMEN EMPLOYED, AND THE WOMEN'S LAW PROJECT AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*

This *amici curiae* brief is submitted on behalf of Lambda Legal Defense and Education Fund, Inc., the American Civil Liberties Union, the Anti-Defamation League, the California Women's Law Center, the Center for Women Policy Studies, the Friends Committee on National Legislation, Gay and Lesbian Advocates and Defenders, the Human Rights Campaign, the National Asian Pacific American Legal Consortium, the National Council of Jewish Women, the National Gay and Lesbian Task Force, the National Partnership for Women and Families, the National Urban League, the National Women's Law Center, the National Youth Advocacy Coalition, the Northwest Women's Law Center, the NOW Legal Defense and Education Fund, People for the American Way Foundation, Women Employed, and the Women's Law Project.[1]

By written consent of the parties,[2] *amici curiae* submit this brief in support of Respondents, Patricia Garrett and Milton Ash.

SUMMARY OF ARGUMENT

The central issue in this case is whether the remedies afforded by the Americans with Disabilities Act (ADA) are appropriate legislation pursuant to Congress' power under § 5 of the Fourteenth Amendment to remedy and to deter

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[1] Statements of interest of the each of the *amici* organizations are included in the Appendix to this brief.

[2] Letters of consent from the parties have been filed separately with the Clerk of the Court. This brief has been authored in its entirety by undersigned counsel for the *amici*. No person or entity, other than the named *amici* and their counsel, made any monetary contribution to the preparation or submission of this brief.

unconstitutional state conduct. Legislation that clearly states Congress' intent to abrogate the states' Eleventh Amendment sovereign immunity is valid under § 5 if there is "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne v. Flores* 521 U.S. 507 (1997). The evidence of the states' participation in the institutionalized exclusion of those with disabilities throughout society, and the need for remedial measures to end unconstitutional state action, demonstrate that the ADA was a congruent and proportional use of Congress' § 5 powers.

At the time of the ADA's drafting, the widespread inaccessibility of public facilities and programs reflected states' embrace of the presumed unfitness and consequent exclusion of people with disabilities, and the incorporation of those assumptions into the bricks and mortar of their institutions. The evidence of wide-scale unwillingness on the part of state officials to hire those with disabilities on the basis of others' discomfort and presumptions of unfitness further buttress the foundation for a broader federal remedy.

It is clear that much of the state discrimination documented at the time of the ADA's adoption would not stand up to even the minimal constitutional yardstick of rational basis scrutiny under the Fourteenth Amendment's equal protection clause. Intentional exclusion of persons with disabilities from a host of state jobs and services for no reason other than the fact of their disabilities, and the prejudice attendant to that fact, cannot survive rational basis scrutiny. The ADA also responds to state conduct that impinges fundamental rights, such as the right to raise one's children without unnecessary state intrusion, and consequently triggers strict scrutiny in many contexts.

The emphasis of the ADA is on eradicating prejudice and intentional discrimination, and protects only those with disabilities who in effect can demonstrate that they are similarly situated to others who seek or hold the job or service

at issue. In fashioning a proportional response to the pervasive problem of disability discrimination, Congress recognized that the unique aspects of discrimination against individuals with disabilities require a different set of remedies than those provided in other civil rights statutes. The nature of these remedies — including reasonable accommodations and modifications of policies, practices or structures which preclude the participation of the differently-abled — reflects the nature of disability-based discrimination.

The reasonable accommodation requirement is an essential part of ending discrimination against people with disabilities; without it, intentional discrimination insulated with the moat of steep stairs, narrow doorways, and other more subtle barriers to the free egress and participation of those with disabilities would remain unassailable. To the extent the ADA reaches beyond the Constitution's requirements, it does so only to the degree necessary to secure the integration essential to combating prejudice and deterring further unconstitutional conduct.

ARGUMENT

THE ADA IS A CONGRUENT AND PROPORTIONAL RESPONSE TO THE HISTORY OF STATES' UNCONSTITUTIONAL DISABILITY-BASED DISCRIMINATION BECAUSE THE ADA PROHIBITS CONDUCT THAT IS EITHER FORBIDDEN BY THE CONSTITUTION OR LIKELY TO PERPETUATE UNCONSTITUTIONAL TREATMENT OF THOSE WITH DISABILITIES.

Introduction

While the Eleventh Amendment bars suits in federal

courts against nonconsenting states, § 5 of the Fourteenth Amendment grants Congress the authority to abrogate the States' sovereign immunity in order to enforce that amendment's provisions. *Kimel v. Florida Board of Regents*, 120 S. Ct. 631, 640, 644 (2000). There is no dispute that Congress clearly stated its intent to abrogate states' immunity in its enactment of the ADA. The question presented here is whether the ADA is appropriate remedial legislation pursuant to Congress' power under § 5 to remedy and to deter unconstitutional state conduct.

As this Court recognized in *City of Boerne v. Flores*, 521 U.S. 507 (1997), Congress must be afforded much deference in its determinations as to "whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Id.* at 536. Congress' power in this regard is both to remedy and to deter constitutional violations, and consequently encompasses the authority to prohibit that which the Fourteenth Amendment itself does not prohibit. *Id.* at 518.

However, Congress' power to enact remedial legislation cannot cross the line into a "substantive redefinition of the Fourteenth Amendment right at issue," *Kimel*, 120 S. Ct. at 644; *see also City of Boerne*, 521 U.S. at 519-20. "Recognizing that 'Congress must have wide latitude in determining where [that line] lies,'" *Kimel*, 120 S. Ct. at 644, *quoting City of Boerne*, 521 U.S. at 520, the Court articulated an elastic rather than bright line test. Accordingly, legislation intended to abrogate the states' immunity from private damages actions in federal court is valid under § 5 if there is "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Kimel*, 120 S. Ct. at 644; *City of Boerne*, 521 U.S. at 520. In *City of Boerne* and *Kimel*, the Court applied this test by assessing the extent to which each law rested on a record of unconstitutional conduct on the basis of religion (*City of Boerne*) or age (*Kimel*), and the corresponding scope of the

prohibitions against constitutional state conduct. *City of Boerne*, 521 U.S. at 520, 531-32 ; *Kimel*, 120 S. Ct. at 645, 648. Neither aspect of the analysis, standing alone, was dispositive of the Court's conclusion that both the Religious Freedom Restoration Act (RFRA) and the Age Discrimination in Employment Act (ADEA) failed the congruence and proportionality test. In both cases, however, the Court found a record empty of unconstitutional state conduct, coupled with an incongruent, exceedingly broad reach into state conduct that targeted very little likely to be unconstitutional. *See City of Boerne*, 521 U.S. at 533-34; *Kimel*, 120 S. Ct. at 650.

The ADA satisfies the test articulated in *Boerne* and developed in *Kimel* to assess the validity of Congressional exercises of its remedial powers under § 5. *First*, a long and persistent history of state discrimination existed, and was reflected in the legislative history, as a predicate to the ADA. *Second*, much of the activity prohibited by the ADA also is intentional discrimination forbidden by the Constitution. *Third*, to the extent the ADA's requirements reach beyond those of the Constitution, they do so to remedy or prevent unconstitutional conduct in a manner that ensures minimal interference in the business of the states. Congress accomplished this through a careful balance of the nature of disability-based discrimination, and the need for greater integration of those with disabilities into the larger society, with the recognition that disability sometimes can be relevant to legitimate state interests.

I. CONGRESS CRAFTED THE ADA IN RESPONSE TO A DOCUMENTED HISTORY OF PERVASIVE, INSTITUTIONALIZED, AND UNCONSTITUTIONAL EXCLUSION OF PEOPLE WITH DISABILITIES FROM ALL ASPECTS OF SOCIETY.

A. Congress Had Ample Evidence of Discriminatory State Conduct Against People With Disabilities.

The Petitioner's picture of robust state hospitality toward people with disabilities blurs the truth of a far more hostile history. Its assertion that, in its consideration of the ADA, "Congress failed to establish any record of constitutional violations by State governments"[3] is belied by the record itself.

Congress summarized the scope of the problem in its findings in the ADA: that individuals with disabilities have been "subjected to a history of purposeful unequal treatment," and that this treatment has occurred "in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. § 12101. Roughly half of these basic areas represent enterprises which largely, or exclusively, are the province of state government.[4]

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[3] Brief of Petitioner at 21.

[4] "[T]he express congressional findings with respect to pervasive discrimination address many areas that are controlled to a significant degree by state and local governments. For example, Congress identified discrimination in education as a particular problem. *See* 42 U.S.C. § 12101(3). Education in this country is overwhelmingly an enterprise of state and local government. Another sector singled out in the statute was

Consistent with testimony documenting the impact of bias on employment opportunities for people with disabilities, the 1989 report of the Congressionally-created Advisory Commission on Intergovernmental Relations described the sobering results of a poll of state agency officials to determine the causes of the underemployment of person with disabilities in State jobs.[5] Most of the state officials polled (82.7%) stated that "negative attitudes/misinformation" had a "strong" or "moderate" impact on state hiring of individuals with disabilities.[6] They described the "significant" impact of attitudes which ranged from "feelings of discomfort in associating with disabled individuals" to "inaccurate assessments of their productivity." *Id.* at 73. Congress also had other evidence of the broad, intractable resistance to public employment of individuals with disabilities; twenty-three jurisdictions surveyed, for example, were unwilling to hire blind applicants, while many excluded applicants with a

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health services, *see* 42 U.S.C. § 12101(3), in which state and local governments also play a powerful role. The same is true for transportation, also mentioned in § 12101(3). Congress' specific attention to sectors with such a substantial state and local governmental presence indicates that it knew that government action at the state level was an important part of the problem it was addressing." *Erickson v. Board of Governors of State Colleges and Universities for Northeastern Illinois University*, 207 F.3d 945, 957-58 (7th Cir. 2000) (Wood, J., dissenting) (footnotes omitted). *See also* A & P S. Rep. 101-116, at *16; A & P Comm. Print 1990 (28A), at *315 (1988) (referencing testimony about existence of architectural, transportation, and communication barriers as critical reasons preventing individuals with disabilities from full use of transportation and public accommodations).

[5] *See* Advisory Commission on Intergovernmental Relations, Disability Rights Mandates: Federal and State Compliance with Employment Protections and Architectural Barrier Removal (April 1989) [hereinafter "ACIR REPORT"].

[6] ACIR Report, *supra* n.6, at 72.

history of cancer. *See* 135 Cong. Rec. S4984, S4988 (daily ed. May 9, 1989) (remarks of Sen. Jeffords).[7]

The ability of individuals with disabilities to gain access to government institutions and services has a profound impact not only on the feasibility of securing employment, but also on the ability to take part in a vast range of important programs, even the ability to exercise recognized rights. In the area of physical accessibility, Congress learned that state governments long assumed homogeneously impairment-free citizenship in the construction of its public facilities and programs, with the concomitant exclusion of those whose characteristics fall outside that assumption:

> The extent of inaccessibility was illustrated by a 1980 study of State-owned buildings, housing services and programs available to the general public. The study found *76 percent of the buildings physically inaccessible and unusable for serving handicapped persons*, even when taking into account the option of moving programs and services to other parts of the building or otherwise restructuring them.

U.S. Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities 38-39 (1983) (emphasis

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[7] Congress also was aware of state employment discrimination cases brought by individuals with disabilities, including the growing problems of irrational discrimination experienced by employees with AIDS. *E.g., Pushkin v. Regents of the University of Colorado*, 658 F.2d 1372, 1387 (10th Cir. 1981) (refusal to admit physician with multiple sclerosis to psychiatry residency program); *Chalk v. U. S. District Court*, 832 F.2d 1158 (9th Cir. 1989) (teacher with AIDS removed from classroom instruction); *Schmidt v. City of Chicago*, No. 86-C-8031, 1988 U.S. Dist. LEXIS 12893. *See Conroy v. Aniskoff*, 507 U.S. 511, 516, 516 n.10 (1993) (noting presumption that Congress is aware of relevant case law).

added) [hereinafter "Accommodating the Spectrum"].[8] Congress also heard individual testimony on the lack of access to public facilities as central as court houses.[9] And as of 1984, when Congress considered adoption of the Voting Accessibility for the Elderly and Handicapped Act, 42 U.S.C. § 1973ee, it learned that many state polling places were physically inaccessible and that only *four* states required accommodations and modifications to ensure the disabled physical access to the voting booth.[10] Just several years before Congress began its consideration of the ADA, it became clear through the case of *Hill v. Shelby County*, 599 F. Supp. 303, 304 (N.D. Ala. 1984), that *all* Alabama state courts routinely excused individuals with disabilities from jury service because they were not equipped to accommodate them.[11]

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[8] This 1983 report by the U.S. Commission on Civil Rights was featured repeatedly in Congressional Committee reports, and described the multiple causes and consequences of the many years of exclusion of disabled people from the mainstream of American life.

[9] *See, e.g., Americans with Disabilities Act, Joint Hearing on H.R. 4498 and S. 2345 Before the Subcommittee on Select Education and the Subcommittee on the Handicapped*, 101st Cong., 2d Sess. (1988) (testimony of Sandra Parrino) (refusal of states to build accessible public facilities, including town halls); *Americans with Disabilities Act, Hearing on H.R. 4498 Before the Subcommittee on Select Education*, 101st Cong., 2d Sess. (1989) (statement of Emeka Nwojke) (concerning inaccessibility of court houses and court rooms).

[10] *See also* 135 Cong. Rec. S10793 (daily ed. Sept. 7, 1989) (statement of Sen. Biden) (describing the experience of a constituent who had to either hire an ambulance or crawl in order to vote); *id.* at S10753 (statement of Sen. Gore) (commenting on "the tradition of blatant and subtle discrimination" of states in failing to accommodate voters with disabilities).

[11] Accessible transportation was a significant aspect of the problem, and had a causal relationship to some of the isolation of those with

Some of the uglier accounts of disability-based discrimination involved children. For example, the legislative record includes testimony about a public school's refusal to admit a wheelchair-bound child because of concerns that he presented a "fire hazard," S. Rep. No. 101-116, at 7 (1990); and another public school's decision to exclude a child with cerebral palsy based on the "nauseating effect" of his appearance on other students. *Id.* (quoting 117 Cong. Rec. 45974 (1971) (statement of Rep. Vanik)). *See also Martinez v. School Board, Florida*, 861 F.2d 1502 (11th Cir. 1988) (segregation of mentally retarded student with AIDS by glass wall separating her from her classmates); *Robertson v. Granite City Community8Unit School District No. 9*, 684 F. Supp. 1002 (S.D. Ill. 1987) (exclusion of first grade student with AIDS from his regular classroom); *Ray v. School Dist. of DeSoto County*, 666 F. Supp. 1524 (M.D. Fla. 1987) (school district refused to allow HIV positive siblings to remain in school); *Thomas v. Atascadero Unified School District*, 662 F. Supp. 376 (C.D.Cal. 1986) (exclusion of child with AIDS from kindergarten); *Doe v. Dolten Elementary School District No. 148*, 694 F. Supp. 440 (N.D. Ill. 1988) (exclusion of child with AIDS from classroom).

State discrimination against the institutionalized disabled has been particularly severe, and ongoing. State-

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mobility impairments. *See e.g.*, Testimony of Jay Rochlin, Executive Director of the President's Committee on Employment of People with Disabilities before the House Subcommittee on Select Education and Employment Opportunities, Ser. No. 101-151,at 29 (Sept. 13, 1989), *cited in* H.R. Rep. No. 101-485(II), at 37 (1990) (surveys done in 45 communities documented inadequate accessible public transportation services); Testimony of Speed Davis, Assistant Director of the Massachusetts Office of Handicapped Affairs before the House Subcommittee on Select Education, Ser. No. 100-109, at 222 (Oct. 24, 1988) , *cited in* H.R. Rep. No. 101-485(II), 37 (1990) (discussing repeated instances of disabled individuals turning down jobs because they could not arrange reliable transportation).

operated facilities have "essentially warehous[ed] patients in an inhumane environment,"[12] maintained conditions in which "[i]nfectious diseases were common[,]... minimally adequate health care was unavailable, ... [a]ssaults on residents by staff members, including sexual assaults, were frequent, ... [d]angerous psycho tropic drugs were indiscriminately used ...,"[13] and "[c]lients lay half-naked and unattended in their own urine and feces on cold floors in dismal surroundings while untrained attendants watched television."[14] Institutionalized people also have had to counter the presumptions of incompetence manifested in denial of voter registration or use of absentee ballots.[15]

As the U.S. Commission on Civil Rights documented, state discrimination even has been evident in a spectrum of core activities, from the rights afforded other citizens to vote, hold public office or serve on juries,[16] to basic personal

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[12] *Wyatt ex rel. Rawlins v. Rogers*, 985 F. Supp. 1356, 1362 (M.D. Ala. 1997) (describing Alabama state's mental health facilities).

[13] *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 128 n.1 (1984) (Stevens, J., dissenting).

[14] *Society for Good Will to Retarded Children v. Cuomo*, 745 F. Supp. 879 (E.D.N.Y. 1990).

[15] *E.g., Boyd v. Board of Registrars of Voters of Belchertown*, 334 N.E.2d 629, 632 (Mass. 1975) (refusal to allow institutionalized individuals to register to vote); *see also I/M/O Absentee Ballots Cast By Five Residents of Trenton Psychiatric Hospital*, 750 A.2d 790, 791-92 (N.J. 2000) (refusal to accept absentee ballots of Trenton Psychiatric Hospital on the presumption of their incompetence).

[16] Some state courts have been sued because of policies barring disabled individuals from participating in judicial proceedings. *See Galloway v. Superior Ct.*, 816 F. Supp. 12 (D.D.C. 1993). *See also State v. Spivey*, 700 S.W.2d 812, 813 (Mo. 1985) (affirming exclusion of "deaf, mute, deaf-mute and blind persons" from jury pool because "[w]e

decision-making[17] and from entering contracts, to choosing to marry[18] and raise children.[19] Accommodating the Spectrum, *supra*, at 8.

In short, "[t]he record before Congress ... evidenced that discrimination against disabled people persisted in government programs,"[20] and that "Congress was aware" that "state and local officials, consciously and intentionally, out of animus and ignorance, segregated persons with disabilities" and treated them "as not only inferior, but also as

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doubt that deaf persons have a community of attitudes or ideas"); *DeLong v. Brumbaugh*, 703 F. Supp. 399, 406 (W.D. Pa. 1989) (State superior court judge testifying that he "would disqualify a deaf person under all circumstances").

[17] *See Poe v. Lynchburg Training School and Hospital*, 518 F. Supp. 789 (W.D. Va. 1981) (class action lawsuit by former Virginia state institutions who were involuntarily sterilized).

[18] *See* Utah Code Ann. § 30-1-2(1) (1987) (providing that marriage with "persons afflicted with acquired immune deficiency syndrome" is "prohibited and ...void"). Only after the ADA went into affect was the law successfully challenged. *T.E.P. v. Leavitt*, 840 F. Supp. 110 (D. Utah 1993).

[19] Even in the years shortly preceding, and immediately following, the ADA's adoption, state courts repeatedly found that having a parent with a disability was not in a child's best interests. *E.g., Stewart v. Stewart*, 521 N.E. 2d 956 (Ind. 1988) (denial of custody to parent with HIV); *H.J.B. v. P.W.*, 628 So. 2d 753 (Ala. 1993) (termination of father's parental rights based on his infection with HIV); *Bednarski v. Bednarski*, 366 N.W.2d 69 (Mich. 1985) (reversing termination of deaf woman's custody of her "two normal children").

[20] *See* Stephen L. Mikochik, *The Constitution and the Americans With Disabilities Act: Some First Impressions*, 64 Temp. L. Rev. 619, 623, 623 n.33 (1991).

dangerous."[21] Petitioners offer no legitimate state justification for these severe incursions into the basic rights of the disabled; rather, they simply ignore their existence.

The Petitioner's recitation of the short list of record references to positive state action on behalf of the disabled is beside the point. Even if states protected the disabled as frequently as they abused them, the question is whether there is sufficient evidence of unconstitutional state conduct to warrant the ADA's enactment as legitimate remedial legislation. This Court's prior decisions do not suggest that a limited record of correct behavior eclipses the overwhelming testimony about the discrimination that infected public institutions;[22] nor must Congress identify every unconstitutional state harm that could serve as a predicate to a

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[21] Timothy M. Cook, *The Americans With Disabilities Act: the Move to Integration*, 64 Temp. L. Rev. 393, 397-98 (1991).

[22] Testimony concerning favorable state treatment of those with disabilities is more than countered by testimony to the contrary. In the area of employment, for example, some of the testimony Congress heard included accounts of the denial of teacher certification to a woman with paralysis of the legs. S. Rep. No. 101-116, at 7 (1990); New York State's refusal to hire blind rehabilitation counselors, *Americans With Disabilities Act: Hearing on H.R. 4498 Before the Subcommittee on Select Education*, 101st Cong., 2d Sess. (1988); a state mental retardation facility's refusal to hire a job applicant with a mobility impairment, *id.* At 1225; the routine refusal of California state agencies to hire cancer survivors, *Americans with Disabilities Act, Hearing on H.R. 2273 Before the Subcommittee on Select Education*, 101st Cong., 2d Sess. (1989) (statement of Arlene Mayerson); and a state university's firing of a professor of veterinary medicine because he had AIDS. *Americans with Disabilities Act: Hearing on S. 933 Before the Senate Comm. On Labor and Human Resources,* 101st Cong., 2d Sess. (1989) (statement of National Organizations Responding to AIDS). Moreover, that states may have enacted "special programs" for the disabled does not take away from their repeated failure to treat them equally in state employment and general state programs.

legitimate exercise of its § 5 powers.[23] Congress had available to it clearly sufficient evidence of state discrimination against individuals with disabilities that was unconstitutional even under a rational basis analysis.

While it is state conduct, not the existence of state laws, which is relevant to the Court's congruence and proportionality analysis, the Court has on occasion taken note of the existence of state remedies for the threat of discrimination.[24] As Petitioners point out, Congress heard testimony on the availability and nature of state disability antidiscrimination laws. Indeed, a report to Congress by a Governors' Committee representing all fifty states indicated that state laws were inadequate to redress disability-based discrimination. A & P S. Rep. 101-116, *18 (1989). As the report suggests, a close look at the substance of state antidiscrimination laws reveals a patchwork of statutes and regulations that, in many instances, fail to address areas of documented unconstitutional conduct.

At the time of the ADA's adoption, for example, at least seven states, including Alabama, did not extend antidiscrimination protections to those with mental health disabilities,[25] despite the plethora of evidence that some of the

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[23] *See Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 200, 209 (1997) (position that Congress is under obligation to develop detailed factual record "to accommodate judicial review" is "constitutionally unwarranted").

[24] *See, e.g., Florida PrePaid Postsecondary Ed Expense Bd. v. College Savings Bank*, 119 S. Ct. 2199, 2209 (1999); *Kimel*, 120 S. Ct. at 650.

[25] Ala. Code § 21-7-1 to 21-7-10 (WESTLAW through 1989) Ariz. Rev. Stat. Ann. § 41-1461(4) (West, WESTLAW through 1989); Calif. Gov't Code § 12940(West, WESTLAW through 1989); Kan. Stat. Ann. § 44-1009(a)(1) (WESTLAW through 1990); Ky. Rev. Stat. Ann. § 207.130(2), 150(1) (Michie, WESTLAW through 1989); Miss. Code

most severe forms of discrimination have been perpetrated against the mentally ill and mentally retarded.[26] In states that had prohibitions against disability-based discrimination, at least twenty-five did not provide for a reasonable accommodation.[27] And of those states that did have such a prohibition, at least nine did not expressly provide for a private right of action with damages to remedy the State's

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Ann. §43-6-15(WESTLAW through 1990); Nev. Rev. Stat. Ann. §613.330(Michie, WESTLAW through 1989)

[26] *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 461-63 (1985) (Marshall, J., concurring in part and dissenting in part).

[27] Ala. Admin. Code r. 670-X-4-.01 (WESTLAW through 2000); Alaska Stat. § 18.80.200 (WESTLAW through 1989); Calif. Gov't Code § 12940(West, WESTLAW through 1989); Conn. Gen. Stat. § 46a-60 (West, WESTLAW through 1989); Fla. Stat. Ann. § 413.08(3) (West, WESTLAW through 1989); Haw. Rev. Stat. § 378-2 (Michie, WESTLAW through 1989); Ill. Ann. Stat. Ch. 68, para. 1-102-3, 2-102 (West, WESTLAW through 1989); Ind. Code Ann. § 22-9-1-13 (Burns, WESTLAW through 1989); Iowa Code Ann. § 601A.6 (West, WESTLAW through 1989); Kan. Stat. Ann. § 44-1009(a)(1) (WESTLAW through 1990); Ky. Rev. Stat. Ann. § 207.130(2), 150(1) (Michie, WESTLAW through 1989); Me. Rev. Stat. Ann. tit. 5, § 4572 (West, WESTLAW through 1989); Md. Ann. Code of 1957, Art. 49B § 16(Michie, WESTLAW through 1989); Miss. Code Ann. §43-6-15(WESTLAW through 1990); Mo. Ann. Stat. §213.055 (West, WESTLAW through 1989); Nev. Rev. Stat. Ann. §613.330(Michie, WESTLAW through 1989); N.H. Rev Stat. Ann. § 354-A:3(XIII),A:8 (WESTLAW through 1989); N.J. Stat. Ann. §10:5-12(West, WESTLAW through 1989); N.M. Stat. Ann. §§ 28-1-2(M)-(N), 28-1-7 (WESTLAW through 1989); N.Y. Exec. Law §§ 292(21), 296 (McKinney, WESTLAW through 1989); Okla. Stat. Tit. 25, § 1301, 1302 (West, WESTLAW through 1989); S.C. Code Ann. §§ 43-33-510-580 (WESTLAW through 1989); Tenn. Code Ann. § 8-50-103(a) (WESTLAW through 1989); Utah Code Ann. § 34-35-6 (Michie, WESTLAW through 1989); Wash. Rev. Code Ann. § 49.60.180 (West, WESTLAW through 1989).

employment discrimination against the disabled.[28] Outside the employment context, at least nineteen states did not expressly provide for application to the state in prohibiting discrimination against the disabled in accessibility and accommodation,[29] and in the small set of states with an express

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[28] Ala. Admin. Code r. 670-X-4-.03 (WESTLAW through 2000); Ariz. Rev. Stat. Ann. § 41-1481(D) (West, WESTLAW through 1989) (expressly exempts state); Calif. Gov't Code § 12960(West, WESTLAW through 1989); Conn. Gen. Stat. § 46a-86 (West, WESTLAW through 1989); Ind. Code Ann. § 22-9-1-6(k)(2) (Burns, WESTLAW through 1989) (judicial review limited to respondent); Ky. Rev. Stat. Ann. § 150(1), 207.130(2), 344.040-45 (Michie, WESTLAW through 1989) (the "Civil Rights" law does not enumerate "disability" and restricts judicial review to itself); Miss. Code Ann. §§25-9-131, 43-6-15(WESTLAW through 1990) (judicial review limited to "employee," and proscription only applies to those "seeking" employment); Vernon's Ann. Texas Civ. St. art. 5221K, sec. 7.01 (WESTLAW through 1988) (1989 database not available) (only Commission can sue); Wis. Stat. Ann. § 111.39(West, WESTLAW through 1989).

[29] Calif. Civ. Code § 51(West, WESTLAW through 1989); Colo. Rev. Stat. Ann. § 24-34-601 (West, WESTLAW through 1989); Conn. Gen. Stat. § 46a-64 (West, WESTLAW through 1989); Del. Code Ann. tit. 6, § 4504 (WESTLAW through 1989); Fla. Stat. Ann. § 413.08(West, WESTLAW through 1989); Ga. Doc. Ann. § 30-4-1 (WESTLAW through 1989); Idaho Code § 56-702-703 (Michie, WESTLAW through 1989); Ind. Code Ann. § 16-7-5-2 (Burns, WESTLAW through 1989) (other coverage limited to the blind); Ky. Rev. Stat. Ann. § 258.5000 (Michie, WESTLAW through 1989) (other coverage limited to blind and deaf); Mass. Gen. Laws Ann. ch. 151B, §4(6)-(8) (West, WESTLAW through 1989); Miss. Code Ann. §43-6-5 (WESTLAW through 1990); Nev. Rev. Stat. Ann. §651.070(Michie, WESTLAW through 1989); N.M. Stat. Ann. § 28-1-2(H) (WESTLAW through 1989); N.Y. Exec. Law §§ 292(9), 296(1) (McKinney, WESTLAW through 1989); Or. Rev. Stat. §§ 30.675, 659.425 (West, WESTLAW through 1989); R.I. Gen. Laws § 42-87-3(a) (WESTLAW through 1989); Tenn. Code Ann. § 4-22-501 (WESTLAW through 1989); Utah Code Ann. § 26-30-1 (Michie, WESTLAW through 1989); Vt. Stat. Ann. title 9, § 4502 (WESTLAW through 1989); Wyo. Stat. § 35-13-201 (WESTLAW through 1989). In

prohibition, at least eight also did not expressly provide for a private right of action.[30]

The assertions of the State of Alabama on the generous scope of its state law protections for the disabled are particularly ironic. Prior to enactment of the ADA, notwithstanding that Alabama had passed a law endorsing accessibility for the disabled, it had enacted nothing more than a statement of policy providing that the physically disabled have an equal right to make use of public facilities, sidewalks, and the like; it did not provide any means of enforceability against the State.[31] Indeed, in 1984 when a disabled Alabama citizen sought to enforce § 21-7-2 in part because she could not climb the stairs to the second floor county courthouse to defend herself in a legal proceeding, the federal judge presiding over her unsuccessful claim to enforce accessibility made an observation that extends beyond its §1983 context: "Legislative recognition of a general, salutary public policy does not, without specific intent to do so, create a state

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the narrow set of states where there was express application to the state, in at least five the cited statute did not expressly prohibit the state from discriminating against the mentally disabled in accessibility and accommodation. Ala. Code § 21-7-1 to 21-7-10 (WESTLAW through 1989); Ark. Code Ann. § 20-14-303 (West, WESTLAW through 1989); Ga. Doc. Ann. § 30-4-1 (WESTLAW through 1989); Idaho Code § 56-702-703 (Michie, WESTLAW through 1989); Kan. Stat. Ann. § 44-1009(c)(3) (WESTLAW through 1990).

[30] Ala. Code § 21-7-1 to 21-7-10 (WESTLAW through 1989); Alaska Stat. § 18.80.200-295 (WESTLAW through 1989); Ark. Code Ann. § 20-14-301-306 (WESTLAW through 1989); Calif. Civ. Code § 51-52 (West, WESTLAW through 1989); Colo. Rev. Stat. Ann. § 24-34-601-602 (West, WESTLAW through 1989); Conn. Gen. Stat. § 46a-64(c) (West, WESTLAW through 1989); Ga. Doc. Ann. § 30-4-1 (WESTLAW through 1989); Idaho Code § 56-706 (Michie, WESTLAW through 1989).

[31] Ala. Code § 21-7-1 to 21-7-3 (West, WESTLAW through 1989).

property or liberty right . . . ." *Hill v. Shelby County*, 599 F. Supp. at 305. The judge further observed that the plaintiff "has nothing to complain about in a federal court unless and until the Congress of the United States specifically requires elevator access to all State courtrooms, jury deliberation rooms, and restrooms." *Id.* In fact, in *Ethridge v. State of Alabama*, 847 F. Supp. 903 (M.D. Ala. 1993), the state argued vigorously that § 21-7-8 does not create a private cause of action against the state. And, contrary to Alabama's further assertion to this Court that its internal personnel board could provide "monetary remedies," the board's list of powers included no such remedies. Ala. Code § 36-26-6 (a)(3) (West, WESTLAW through 1989).

The sobering record of state discrimination against those with disabilities is emblematic of the extent to which this prejudice had leeched into all of our social institutions. Extensive legislative testimony, supplemented by studies and reports by state and federal government agencies and Presidential commissions, indisputably documented the fact that disability-based discrimination was everywhere, and that, as one Congressional Report summarized, "individuals with disabilities have been isolated and subjected to discrimination and such isolation and discrimination is still pervasive in our society." Senate Labor Committee Report, at 2.[32]

The record compiled in advance of the ADA's

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[32] For example, one small slice of the record before Congress was provided by the National Council on the Handicapped, an independent federal agency appointed by President Reagan to investigate the status of disabled Americans. *See* A & P Comm. Print 1990 (28B), at *941 (1988). After five years of hearings, the Council reached "the same inescapable conclusions again and again: *barriers and discrimination*, rather than the inherent physical or mental characteristics of persons with disabilities themselves, are to blame for the staggering unemployment and isolation of these citizens..." A & P Comm Print 1990 (28B), at *941 (1988) (statement of Rep. Tony Coelho) (emphasis added).

adoption reveals two themes which run throughout: a plea not for new social programs or special jobs but for the removal of barriers – physical as well as those based on discomfort or other negative attitudes – to existing ones; and the inclusion of publicly-operated enterprises in the litany of areas in which barriers had proved prohibitive to those with disabilities.

The record of discrimination against those with disabilities dispenses with the argument that, like the ADEA, Congress' extension of the ADA to the states "was an unwarranted response to a perhaps inconsequential problem." *See Kimel*, 120 S. Ct. at 648-49. Congress adopted the Americans With Disabilities Act with the purpose of "bring[ing] persons with disabilities into the economic and social mainstream of American life." Senate Comm. On Labor and Human Resources, Report on the Americans With Disabilities Act, S. Rep. No. 101-116 (1990) [hereinafter "Senate Labor Comm. Report"]. Senator Hatch described the ADA as " a bill that really enfranchises 43 million Americans who have not had ... coequal treatment in our society." 135 Cong. Rec. S10714 (daily ed. Sept. 7, 1989).

B. The Relevant Constitutional Standards Demonstrate that States' Treatment of Persons With Disabilities Frequently Fell Below Minimum Fourteenth Amendment Requirements.

Under the Equal Protection Clause of the Fourteenth Amendment "[e]very person within the State's jurisdiction [is protected] against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Sioux City Bridge Co. v. Dakota County, Neb.*, 260 U.S. 441, 445 (*quoting Sunday Lake Iron Co. v. Wakefield Township*, 247 U.S. 350, 352 (1918)). Essentially, this is "a direction that all persons similarly situated should be treated alike." *City of*

Cleburne v. Cleburne Living Center, 473 U.S. at 439.

At a minimum, equal protection requires that distinctions drawn by the government be "rationally related to a legitimate governmental interest." *U.S. Dep't of Agriculture v. Moreno*, 413 U.S. 528, 533 (1973); *see also City of Cleburne*, 473 U.S. at 446. Under this standard of equal protection review, the Court engages in a two-part inquiry: first, whether a classification serves a legitimate state purpose; and second, whether the classification is rationally related to that purpose. *City of Cleburne*, 473 U.S. at 446. State conduct which does not affect a suspect class, or burden a fundamental right, will be analyzed under the rational basis test. Claims of disparate treatment in employment, for example, will be afforded this level of scrutiny. *See, e.g., Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976) (regarding state statute requiring retirement of police officers at age 50).

In *Cleburne*, the Court used rational basis analysis to conclude that the City of Cleburne's refusal to issue a permit to a residential home for the mentally retarded was an unconstitutional manifestation of "an irrational prejudice" against them. 437 U.S. at 450. The city's concern for the "negative attitude" and "fears" of the surrounding property owners, or the prospect of conflict between residents of the home and the surrounding community, could not support the permit denial, as "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable" in the program or subject at issue are not permissible bases for treating the mentally retarded differently. *Id.* at 448.[33] In short, disadvantaging a politically unpopular group on the basis of fears and stereotypes is unconstitutional. *Id.* at 447.

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[33] This Court also rejected the remainder of the city's objections to the facility's proposed location because the city had not raised similar objections to other facilities for the non-disabled that posed the same concerns.

As the record before Congress confirmed, most of states' treatment of the disabled was rooted in the kind of irrational prejudice *Cleburne* condemned.

It is true that the class of persons protected by the ADA are "different" in that "they suffer disability not shared by others." This Court recognized, however, that "[t]he question is whether to *treat* [them] differently." 473 U.S. at 449-50 (emphasis added). The answer here, as in *Cleburne*, is that "this difference is largely irrelevant unless [its presence] would threaten legitimate interests of the [government]..." *Id.* at 448. Reliance on factors irrelevant to legitimate state interests can be presumed "to rest on an irrational prejudice" against the disabled and consequently is violative of the Fourteenth Amendment. *See id.* at 449-50.[34]

There is no conceivable legitimate purpose which the unabashed exclusion of the disabled serves. The construction of state facilities built to accommodate only those who are able-bodied is what it is – an intentional act to include only the able-bodied. Architecture is "the science of designing and constructing buildings,"[35] and the depth of stairs, the width of entrance ways, the height of desks and counters, are far from accidental or incidental; they are designed and built to accommodate the characteristics and needs of those intended to use them. The same can be said for the creation of transportation, central to participation in the work and social fabric of society, with only the able-bodied in mind, or the

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[34] The differences between those with and without disabilities can be relevant to a number of state policies and legislation. *See Cleburne*, 473 U.S. at 454 (Stevens, J. and Berger, C.J., concurring). For example, "[a]n impartial lawmaker...could rationally vote in favor of a law providing funds for special education and special treatment for the mentally retarded." *Id.*

[35] Webster's Dictionary 98 (2d ed. 1979). Architecture, "a system or style of building," has "certain characteristics of structure." *Id.*

structure of jobs and programs that perpetuate exclusion through rigid reliance on irrelevant aspects of program design that preclude the participation of the disabled. Failure to remedy the exclusionary aspects of state facilities and programs, particularly in view of states' awareness of the disabled and policy statements professing to assist them in the years before the ADA's enactment, is intentional discrimination without any rational connection to legitimate state goals.[36] Reasonable accommodations and modifications

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[36] It simply is not equality in any genuine sense to extend an invitation to apply for state employment to all if the invitation can be accepted only by those who can climb stairway entrances, pass through narrow doorways, and attend interviews on a building's top floors without an elevator.

Intentional discrimination manifested through state officials' continued use of buildings and programs that, as a practical matter, exclude only those with disabilities also logically might be characterized as "deliberate indifference." The Court has confirmed that "deliberate indifference" is sufficient to hold a government entity responsible for its refusal to take action to prevent a harm if the plaintiff has sufficiently alleged a constitutional violation. *See Collins v. City of Harker Heights, Texas*, 503 U.S. 115, 124 (1992); *Canton v. Harris*, 489 U.S. 378, 380 (1989); *see also Nabozny v. Poblesny*, 92 F.3d 446, 454 (7th Cir. 1996) (Plaintiff "must show that the defendants acted either intentionally or with deliberate indifference" to prove an equal protection violation); *Powers v. MJB Acquisition Corp.*, 184 F.3d 1147, 1153 (10th Cir. 1999) ("[I]ntentional discrimination can be inferred from a defendant's deliberate indifference to the strong likelihood that pursuit of its questioned policies will likely result in a violation of federally protected rights"). In the case of individuals with disabilities, the stereotype-based brand of discrimination evidenced by the state's continued imposition of incidental policies, practices and structures which fence them out from state facilities and institutions for no legitimate reason evidences deliberate indifference. Just as the state may not "fence in" the mentally ill "solely to save its citizens from exposure to those whose ways are different," *O'Connor v. Donaldson*, 422 U.S. 563, 574-75 (1975), it may not "fence out" those with disabilities for the same reasons, or to preserve the discriminatory status quo literally built into the structures that exclude them.

are indispensable in the breaking down of walls between the disabled and government programs and employment designed for the abled-bodied.

The intractability of barriers to the disableds' access to employment and public services raises the inevitable inference that it is born of animosity toward the class that it affects. It simply cannot be said that a web of policies, practices and actual physical barriers that preclude meaningful opportunities for the disabled to participate in civic life is related to an identifiable legitimate purpose or discrete objective. In fact, the converse is supported in the studies and reports that Congress considered, demonstrating that the overwhelming majority of state buildings were not accessible, and that a similar majority of officials contacted did not hire individuals with disabilities for no "purpose" other than to accommodate the fears, discomfort, and unfounded stereotypes articulated by co-workers. Congress reasonably could conclude that the states were broadly entangled in a status-based classification of disabled persons with no legitimate purpose, something the Equal Protection Clause does not permit.

Even under the appropriate analysis for a nonsuspect class, then, the pervasive condition of discriminatory state treatment of people with disabilities evidenced in their wholesale exclusion from employment and services solely due to their disabilities represents in many instances arbitrary and illegitimate discrimination that cannot withstand rational basis scrutiny.[37] "Congress considered and rejected the assumption

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[37] Certain state conduct towards individuals with disabilities, while not affecting a fundamental right, will receive more rigorous scrutiny than the rational review employed in reviewing, for example, the denial of state and federal benefits at issue in *Heller v. Doe*, 509 U.S. 312 (1993), or in most employment discrimination cases. For example, access to public education may not be a fundamental right, but "neither is it merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation." *Plyler v. Doe*, 457 U.S. 202, 221 (1982)

that the 'inferior economic and social status of disabled people...[was] an inevitable consequence of the physical and mental limitations imposed by disability,' instead attributing the inferior status to 'discriminatory policies based on unfounded, outmoded stereotypes and perceptions, and deeply imbedded prejudices toward people with disabilities.'" *Muller v. Costello*, 187 F.3d 298, 309 (2nd Cir. 1999) *quoting* H.R. Rep. No. 101-485(III), at 25 (1990), *reprinted in* 1990 U.S.C.C.A.N. 447-48. Congress had ample basis for the conclusion that the "inconsistent treatment of people with disabilities by different state or local government agencies is both inequitable and illogical." H.R. Rep. No. 101-485 (II), at 319. *See also* S. Rep. No. 116, 101st Cong., 1st Sess. 9, 18-19 (1989).

Finally, a more demanding standard of review is triggered when fundamental rights are implicated; in such cases the court examines legislation or other state conduct under the "strict scrutiny" standard. *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 670 (1966); *Zablocki v. Redhail*, 434 U.S. 374, 390-91 (1978) (right to marry); *Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972) (prohibited sale of contraceptives to unmarried persons). In these cases, state conduct "will be sustained only if [it is] suitably tailored to serve a compelling state interest." *Cleburne* at 440. As evident in the discussion in section I.A of the brief, Congress was aware of significant unwarranted state incursions into

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(the undocumented status of the children did not establish a sufficient rational basis for denying the benefits that the state afforded other residents; and Texas' statute could not be sustained as furthering its interest in the preservation of the state's limited resources for the education of its lawful residents); *Brown v. Board of Education*, 347 U.S. 483, 493 (1954) ("[I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.").

fundamental rights of the disabled.[38]

II. THE GOALS AND REQUIREMENTS OF THE ADA ARE CONSISTENT WITH ITS CENTRAL PURPOSE OF ERADICATING INTENTIONAL DISCRIMINATION, AND REPRESENT A PROPORTIONATE RESPONSE TO STATE-SPONSORED DISCRIMINATION.

The ADA provides a detailed map for charting the difference between rational and irrational discrimination. It covers only those individuals with a disability, a history of a disability, or those regarded as having a disability who can demonstrate that they are otherwise qualified for the essential functions of the job, with or without reasonable accommodations. 42 U.S.C. §§ 12102(2), 12111(8). As is the case under rational basis review, then, plaintiffs in ADA cases bear the burden of proving that they are "similarly

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[38] Restrictions or impediments imposed on the right to marry and to raise one's children, for example, merit strict scrutiny, which requires that the state justify the restriction by demonstrating its furtherance of a compelling state interest. *See, e.g., Loving v. Virginia,* 388 U.S. 1, 12 (1967); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) (choices about marriage and upbringing of children are among rights ranked as of basic importance in our society and are sheltered by Fourteenth Amendment against State's unwarranted usurpation or disrespect). Restrictions on reproductive rights merit similar scrutiny. *Roe v. Wade*, 410 U.S. 113 (1973). Barriers to citizens' access to the ballot also receive strict scrutiny. *See generally Norman v. Reed*, 502 U.S. 279 (1992); *Illinois State Bd. of Elections v. Socialist Workers Party,* 440 U.S. 173 (1979) (strict scrutiny afforded laws that impose ballot access requirements that single out unpopular political groups for exclusion); Those who are institutionalized or incarcerated have a constitutionally-protected right under the Fourteenth Amendment to necessary medical care and conditions of confinement that satisfy certain minimal standards. *Bell v. Wolfish*, 441 U.S. 520, 535 n.16, 545 (1979); *Youngberg v. Romeo*, 457 U.S. 307, 315-316 (1982).

situated" to those without disabilities as concerns the requirements or purposes of the job or program involved, or that they would be with a reasonable accommodation.

The ADA then focuses on intentional discrimination, and prohibits "discriminat[ion] against a qualified individual with a disability because of the disability of such individual." 42 U.S.C. § 12112(a). This includes, in part, limiting or segregating job applicants or employees, in a way that adversely affects their opportunities, simply on the basis of disability, or denying jobs or benefits to a qualified individual on the basis of that individual's association with an individual with a disability. 42 U.S.C. §§ 12112(b)(1), 12112(b)(4). The Equal Employment Opportunity Commission (EEOC) interprets this section to bar employers from "restricting the employment opportunities of qualified individuals with disabilities on the basis of stereotypes and myths about the individual's disability." EEOC, Interpretive Guidance on Title I of the ADA, 29 C.F.R. § 1630.5 Appendix. This is exactly what the Constitution also requires of states. Employers and other covered entities also are prohibited from contractual or other arrangements with those who engage in this or other forms of discrimination barred under the ADA. *See* 42 U.S.C. § 12112(b)(2). By its plain terms, these provisions target intentional, invidious discrimination.

It is difficult to theorize, for example, a legitimate governmental purpose served by a state's reliance on the sole factor of disability as dispositive in its treatment of certain applicants or employees with equivalent or superior skills when multiple factors typically influence employment decisions affecting others. This is all the more apparent in those cases when someone is refused or removed from employment solely because he or she associates with someone with a disability, or even has no disability at all but is "regarded as" having one. This is precisely the type of conduct resting on stereotype and "irrational prejudice" the Fourteenth Amendment will not countenance. *See City of*

Cleburne, 473 U.S. at 449-50.

The ADA is unlike other civil rights statutes because the nature of the discrimination it seeks to remedy is unique. In addition to the fear and stereotypes that are at the root of most discrimination, people with disabilities continually experience exclusion of a three-dimensional variety; they confront barriers that are physical as well as attitudinal. Addressing one type of barrier but not the other would not resolve the problem of unconstitutional discrimination. And with the invisibility and misunderstanding that is reinforced by keeping those with disabilities physically separate, fear and other irrational reactions will not disappear.

Titles I and II set forth essentially three types of accommodations: (1) reasonable modifications to rules, policies, and practices, (2) the removal of architectural, communication and transportation barriers, and (3) the provision of auxiliary aids. 42 U.S.C. § 12131(2). As with Section 504 of the Rehabilitation, "the goal [is to] eradicat[e] the 'invisibility of the handicapped." A & P Comm. Print 1990 (28A), at *490 (Committee report on Title II--Public Services) (quoting *ADAPT v. Skinner*, 881 F.2d 1184 (3rd Cir. 1989)).

The ADA's requirement of reasonable accommodations and modifications is essential to allow the integration of people with disabilities into the mainstream of society – the first step to ending discrimination. Without this remedy, the burden on the right of people with disabilities to compete for work and participate in programs and services for which they otherwise are qualified is more than incidental; the lack of accommodation makes the right impossible to exercise for millions of Americans. Reasonable accommodations are, after all, simply "insubstantial adjustments or modifications to existing programs, conditions, or facilities to permit handicapped individuals to surmount exclusionary barriers" Kenneth Allen Greene, *Burdens of Proving Handicap Discrimination Using Federal Employment Discrimination*

Law: Rational Basis or Undue Burden?, 1989 Det. C. L. Rev. 1053, 1065 (1989).

The claims concerning the ADA's imposed costs of "curtailing [the states'] traditional general regulatory power," *City of Boerne*, 521 U.S. at 534, are substantially overstated. Evidence presented to Congress during hearings on the ADA demonstrated that most individuals with disabilities who were unemployed typically could work with few, if any, accommodations, and that the costs associated with needed accommodations usually are nominal. *See* S. Rep. No. 101-116, at 10 (1989) (majority of employees will need no reasonable accommodation; many others can be accommodated for cost of less than $50); H.R. Rep. No. 101-485, II, at 33-34, *reprinted in* 1990 U.S.C.C.A.N. at 314-16 (accessible accommodations possible at little or no cost). Congressional committees also received testimony and reviewed reports "concluding that discrimination results in dependency on social welfare programs that cost the taxpayers unnecessary billions of dollars each year." A & P S. Rep. 101-116, at *16-*17. Subsequent cost/benefit analyses of reasonable accommodations in employment confirm that the cost of accommodations is far outweighed by the benefits to the state fisc that employment of qualified disabled individuals provides. *See, e.g.*, Peter David Blanck, *Communicating the Americans with Disabilities Act, Transcending Compliance: A Case Report on Sears, Roebuck and Co.* (The Annenberg Washington Program)(1994) (concluding that the average cost of most accommodations was $36, and that 69% of requested accommodations had no cost).

In any event, even assuming increased short-term costs related to compliance with reasonable accommodations and modifications requirements, any withdrawal of government involvement saves government funding; it is the means of saving money, and the classification that is the basis for it, that earns scrutiny under equal protection principles. Precisely this point is addressed in *Cleburne*. The Court discredited

rationales similar to the "intrusions" claimed in this case — litigation and related costs — as failing to explain why the mentally retarded were singled out. *Cleburne*, 473 U.S. at 449. It is likely that government policies refusing to modify bathroom facilities to accommodate female employees, or providing outdoor sanitary facilities only to female state highway workers, could over time afford the state comparable savings. It is unlikely that many, if any, state entities would pursue such cost-saving measures, just as it is unlikely that such inequities or interference with these workers' ability to maintain state employment would survive equal protection scrutiny. Here, however, disabled employees are being completely excluded from the workplace, not merely denied certain benefits or bathroom facilities. They are being subjected to a separate-but-unequal regime by the states that is the product of prejudice and stereotyping.

Integration of individuals with disabilities serves a critical long-term purpose beyond the more immediate one of inclusion for the individual seeking employment or program access. In *Olmstead v. L.C.*, 527 U.S. 581, 600 (1999), the Court recognized this purpose when addressing the rationales for community-based versus institutional placement and treatment of those with mental disabilities, pointing out that "institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life."[39] The states' past practices have created two separate societies, one for the able-bodied, and a hidden, constricted one for those with disabilities. The minimal cost and effort for states to integrate

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[39] In the context of the exclusion of racial minorities from juries, this Court observed that "[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community." *Batson v. Kentucky*, 476 U.S. 79, 87 (1986).

the disabled is essential to creation of a unified society in which misconceptions can fade and discriminatory reactions subside.

CONCLUSION

For the reasons set forth above, the decision of the Court of Appeals should be affirmed.

Respectfully Submitted,

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APPENDIX

Lambda Legal Defense and Education Fund, Inc. (Lambda) is a national non-profit public interest legal organization dedicated to the civil rights of lesbians, gay men and people with HIV/AIDS through impact litigation, education and public policy work. Founded in 1973, Lambda is the oldest and largest legal organization addressing these concerns. In 1983, Lambda filed the nation's first AIDS discrimination case. Lambda has appeared as counsel or *amicus curiae* in scores of cases in state and federal courts on behalf of people living with HIV or other disabilities, including, in part, *Albertsons, Inc. v. Hallie Kirkingburg*, 119 S. Ct. 2162 (1999); *Cleveland v. Policy Management Systems, Inc.*, 119 S. Ct. 1597 (1999); *Bragdon v. Abbott*, 118 S.Ct. 2196 (1998); *Doe & Smith v. Mutual of Omaha Insurance Co.*, 179 F.3d 557 (1999), *cert denied* 120 S.Ct. 845 (2000); *School Bd. for Nassau Cty. v. Arline*, 107 S. Ct. 1123 (1987); *Chalk v. U.S. District Court* 814 F.2d 701 (9th Cir. 1988); *Raytheon v. Fair Emp. & Housing Comm'n*, 212 Cal. App. 3d 1242 (1989); *McGann v. H&H Music Co.*, 946 F.2d 401 (5th Cir. 1991); *Gonzales v. Garner Food Services, Inc.*, 89 F.3d 1523 (11th Cir. 1996), *cert. denied, Wood v. Garner Food Services, Inc.*, 117 S.Ct. 1822 (1997); and *Mason Tenders Dist. Council Welfare Fund v. Donaghey*, Civ. Action No. 93-1154, 1993 WL 596313, 2 A.D. Cases 1745 (S.D.N.Y. Nov. 19, 1993). Lambda is particularly familiar with the unique barriers confronting persons with HIV and other stigmatized disabilities who attempt to secure access to government sponsored services and programs.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to preserving the principles of liberty and equality embodied in the Constitution. Since its founding in 1920, the ACLU has participated in numerous

cases before this Court. Through its AIDS Project and its state affiliates, the ACLU Foundation engages in extensive advocacy and litigation to protect people with disabilities from discrimination. The ACLU AIDS Project was also deeply involved in efforts to pass the ADA.

The Anti-Defamation League (ADL), one of the nation's oldest civil rights organizations, was founded in 1913 to promote good will among all races, ethnic groups, and religions. As set out in its charter, ADL's "ultimate purpose is to secure justice and fair treatment to all citizens alike and to put an end forever to unjust and unfair discrimination against and ridicule of any sect or body of citizens." Today, ADL remains committed to eradicating discrimination against *all* Americans. To this end, ADL has previously filed *amicus* briefs in discrimination cases heard by the U.S. Supreme Court and other courts, including *Brown v. Board of Education*, 347 U.S. 483 (1954) (opposing discrimination on the basis of race) and *Romer v. Evans*, 517 U.S. 620 (1996) (urging the rejection of an amendment to the Colorado State Constitution which would have precluded the government from preventing discrimination against homosexuals). ADL also believes that to secure fair treatment for all, the federal government must be able to invoke fully its constitutional powers to enact needed civil rights legislation. Therefore, ADL has filed *amicus* briefs before this Court in *City of Boerne v. Flores*, 521 U.S. 507 (1997) (supporting the Religious Freedom Restoration Act) and *United States v. Morrison*, 120 S. Ct. 1740 (2000) (arguing that the U.S. Congress had the power to enact the Violence Against Woman Act's civil-remedy provision).

The California Women's Law Center (CWLC) is a private, nonprofit public interest law center specializing in the civil rights of women and girls. The California Women's Law Center, established in 1989, works in the following priority areas: Sex Discrimination in education and employment,

Women's Health and Reproductive Rights, Family Law, Violence Against Women and Child Care. Since its inception, the CWLC has placed a strong emphasis on advancing the rights of women in employment. The CWLC has initiated the Breast Cancer Legal Project to provide advocacy and legal advice to breast cancer survivors and to address the systemic barriers that prevent women from accessing the health care, and workplace issues related to discrimination, reasonable accommodations and medical leave issues. CWLC's work has focused particularly on the issues of discrimination related to sexual harassment, sex discrimination, disability discrimination related to breast cancer, the intersection of race and gender discrimination, equal access and opportunities, and the right to redress a claim. The issue raised in this case has an enormous impact on the rights of women and girls to be free of the terrible consequences of discrimination and harassment.

Center for Women Policy Studies is an independent, national, multiethnic and multicultural feminist policy research and advocacy institution, founded in 1972. Since our founding, we have recognized and addressed the combined impact of sexism and disability stigma that disabled women, including women with HIV/AIDS, confront in the exercise of their full citizenship. We currently are working with a network of state legislators to ensure disabled women have full and equal protection from violence and discrimination under both federal and state law. The Court's decision in this case will have a significant impact on our work to eliminate discrimination in delivery of social services and access to state jobs, and end violations of disabled women's reproductive rights and parental rights.

The Friends Committee on National Legislation (FCNL) is a Quaker lobby in the public interest. Founded in 1943, FCNL works for social equity, economic justice, peace, and good government. FCNL's legislative policy grows out

of a fundamental belief that there is that of God in every human being and that God's love endows all creation with worth and dignity. FCNL believes that all persons should be accepted on their merits and are equally deserving of a life with dignity. We also recognize that meaningful work contributes to the development of human potential and self-esteem, as well as to community well-being. For all these reasons, FCNL supported passage of the Americans with Disabilities Act (ADA), supports vigorous enforcement of the (ADA), and opposes unjust discrimination on the basis of disability. We join this brief as part of our continued commitment to those who are disabled and differently-abled.

Gay and Lesbian Advocates and Defenders (GLAD) is a nonprofit public interest law firm, headquartered in Boston, Massachusetts and serving the six New England states. GLAD's mission is to protect and enhance the rights of lesbians, gay men, bisexuals, and people living with HIV through litigation, education and advocacy.

The Human Rights Campaign (HRC) is the nation's largest gay and lesbian civil rights organization, with over 360,000 members nationwide. HRC is devoted to fighting and ending discrimination on the basis of sexual orientation, and to protecting the basic civil and human rights of gay, lesbian, and bisexual Americans. To this end, HRC has provided federal and state legislative, regulatory and judicial advocacy, media and grassroots support on a range of initiatives affecting gay, lesbian and bisexual individuals who suffer discrimination on the basis of their sexual orientation, including the Employment Non-Discrimination Act.

The National Asian Pacific American Legal Consortium (the Consortium) is anonprofit, nonpartisan organization based in Washington D.C. whose missionis to advance the legal and civil rights of Asian Pacific Americans.

The Consortium was established in 1991 by its Affiliates, the Asian Law Caucus, the Asian Pacific American Legal Center of Southern California and the Asian American Legal Defense and Education Fund. The Consortium gives voice to Asian Pacific American civil rights concerns on hate crimes, affirmative action, immigration and immigrant rights, voting rights, census issues, language rights and community empowerment through advocacy, community education, public policy development and litigation. The Consortium has an interest in this case because it implicates the civil rights of the disabled, who like minority groups, face discriminatory barriers too, among other things, educational and employment opportunities.

The National Council of Jewish Women (NCJW), Inc. is a volunteer organization, inspired by Jewish values, that works through a program of research, education, advocacy and community service to improve the quality of life for women, children and families and strives to ensure individual rights and freedoms for all. Founded in 1893, the National Council of Jewish Women has 90,000 members in over 500 communities nationwide. Given NCJW's historical commitment to civil rights issues and active involvement in passage of the Americans With Disabilities Act, we join this brief.

Founded in 1973, the National Gay and Lesbian Task Force (NGLTF) has worked to eliminate prejudice, violence and injustice against gay, lesbian, bisexual and transgendered people at the local, state and national level. As part of a broader social justice movement for freedom, justice and equality, NGLTF is creating a world that respects and celebrates the diversity of human expression and identity where all people may fully participate in society.

The National Partnership for Women & Families is a

national advocacy organization that develops and promotes policies to help women achieve equal opportunity, access to quality healthcare, and economic security for themselves and their families. Since its founding in 1971 as the Women's Legal Defense Fund, the National Partnership has worked to advance the rights of women and families through litigation of significant cases, public education, and lobbying efforts. The National Partnership participated as *amicus curiae* in several federal circuit court appeals on a question closely related to the question presented in the present case, to wit: whether state employees can enjoy the protections of the Family and Medical Leave Act.

The National Urban League, under the leadership of Hugh B. Price, has sought to emphasize greater reliance on the unique resources and strengths of the African-American community to find solutions to its own problems. To accomplish this, the League's approach has been to utilize fully the tools of advocacy, research, program service and systems change. The result has been an organization with strong roots in the community, focused on the social and educational development of youth, economic self-sufficiency and racial inclusion. The National Urban League, through its affiliate system, serves more than 2 million individuals each year. The League views with concern any potential diminution of the civil rights of disabled persons.

The National Women's Law Center (NWLC) is non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, NWLC has worked to secure equal opportunity for women in educations, the workplace, and other settings, including through litigation of cases brought under federal anti-discrimination laws. The Center has a deep and abiding interest in ensuring that these laws are

fully implemented and enforced, and has not only private actors and the federal government, but also the states, are held tot he standards of these laws.

The National Youth Advocacy Coalition (NYAC) is the only national organization focused solely on improving the lives of lesbian, gay, bisexual and transgender (LGBT) youth through advocacy, education, and information.

The Northwest Women's Law Center (NWLC) is a non-profit public interest organization that works to advance the legal rights of all women through litigation, education, legislation and the provisions of legal information and referral services. Since it's founding in 1978, the NWLC has been dedicated to protecting and securing equal rights for lesbians and their families, and advocating on behalf of those with differing abilities. The Law Center has long focused on the threats to equality based on sexual orientation and disabilities. Toward these ends, the NWLC has participated as counsel and as amicus curiae in cases throughout the Northwest, and the country and is currently involved in numerous legislative and litigation efforts. The NWLC continues to serve as a regional expert and leading advocate on these issues.

NOW Legal Defense and Education Fund (NOW Legal Defense) is a leading national non-profit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and secure equal rights. A major goal of NOW Legal Defense is the elimination of barriers that deny women economic opportunities, such as employment discrimination. In furtherance of that goal, NOW Legal Defense litigates cases to secure full enforcement of laws prohibiting employment discrimination, including *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998) and *Bowman v. Heller*, 420 Mass. 517 (Ma. 1995), cert. denied, 516 U.S.

1032 (1995). NOW Legal Defense participated as amicus in *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998), *Oncale v. Sundowner Offshore Services*, 118 S. Ct. 998 (1998), *Harris v. Forklift Sys. Inc.*, 510 U.S. 17 (1993), and *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994). NOW Legal Defense has also litigated cases addressing Congress's Section 5 authority to enact remedial legislation to address harms of constitutional proportion. See U.S. v. Morrison, 120 S. Ct. 1740 (2000).

People for the American Way Foundation (People For) is a nonpartisan, education-orientated citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism and liberty. People For now has over 300,000 members nationwide. People For has been actively involved in litigation and other efforts to combat discrimination, including discrimination by state government agencies. People For has supported the Americans with Disabilities Act, and joins this brief to help vindicate the important principles at stake in this case concerning the Act.

Women Employed is a national association of working women based in Chicago, with a membership of 2000. Since 1973, the organization has assisted thousands of working women with problems of sex discrimination and harassment, monitored the performance of equal opportunity enforcement agencies, and developed specific, detailed proposals for improving enforcement efforts. Women Employed strongly believes that discrimination against disabled employees is a civil rights violation that must be remedied as it is a barrier to achieving equal opportunity and economic equity for employees in the workplace.

The Women's Law Project (WLP) is a non-profit

public interest legal advocacy organization located in Philadelphia, Pennsylvania. Founded in 1974, WLP works to abolish discrimination and injustice in our laws and institutions and to advance the legal and economic status of women and their families through litigation, public policy development, public education, and individual counseling. WLP is committed to safeguarding the rights of women who experience invidious discrimination on any basis. To that end, WLP has a strong interest in defending the validity of our anti-discrimination laws as applied to all perpetrators of discrimination